STATE OF MICHIGAN

IN THE SUPREME COURT

TAXPAYERS OF MICHIGAN AGAINST CASINOS, a Michigan non-profit corporation, and LAURA BAIRD, State Representative, Michigan House of Representatives, in her official capacity,

Plaintiffs/Appellees/Cross-Appellants,

v

STATE OF MICHIGAN,

Defendant/Appellant/Cross-Appellee,

and

NORTH AMERICAN SPORTS MANAGEMENT COMPANY, INC., IV, a Florida corporation, GAMING ENTERTAINMENT (Michigan), LLC, a Delaware limited liability company, and LITTLE TRAVERSE BAY BAND OF ODAWA INDIANS,

Intervening Defendants/Appellants/ Cross-Appellees.

_____/

Supreme Court No. 129816

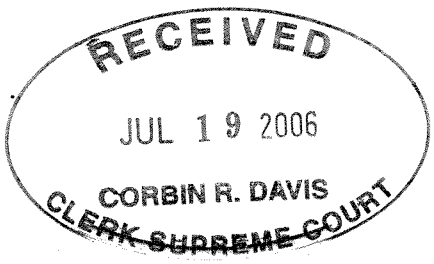
Court of Appeals No. 225017

Ingham County Circuit Court Case No. 99-90195-CZ

THIS APPEAL INVOLVES A RULING THAT A STATE GOVERNMENTAL ACTION IS INVALID

REPLY BRIEF OF TAXPAYERS OF MICHIGAN AGAINST CASINOS (TOMAC), INC.

ORAL ARGUMENT REQUESTED



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INTRODUCTION

The State's and Interveners' arguments contradict the plain language of the compacts. No doubt, this is why those parties carefully avoid the compacts' actual language in their responsive briefing. This Court must enforce the compacts as written and, in so doing, declare the compacts constitutionally infirm.

ARGUMENT

I. THE COMPACTS' PAYMENT PROVISIONS ARE INVALID BECAUSE THEIR PLAIN LANGUAGE DIVERTS MONEY PAYABLE "TO THE STATE" WITHOUT A SUPPORTING LEGISLATIVE APPROPRIATION.

The State and Interveners advance essentially only one argument on the merits of the appropriation issue: that the revenue sharing payments are not State receipts subject to appropriation, because the payments are made by the Tribes to the Michigan Strategic Fund, bypassing the State Treasury altogether. (State Appellees Br at 7-12; Interveners Appellees Br at 27-38.) But in nearly 20 pages of briefing on this issue, neither the State nor the Interveners discuss the actual language of the compacts, which is plain, unambiguous, and controlling:

> SECTION 17. Tribal Payments[1] to State for Economic Benefits of Exclusivity.
>
> (A) The State . . . [will provide] a mechanism to reduce the proliferation of Class III gaming enterprises in the State in exchange for the Tribe providing important revenue to the State.
>
> (B) "So long as [the State does not expand casino gambling] . . ., the Tribe shall make payments to the State as provided in subsection (C).

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[1] *Black's Law Dictionary* defines "payment" as "[p]erformance of an obligation by the delivery of money . . . in partial or full discharge of the obligation." *Black's Law Dictionary* 1165 (8th ed 2004) (emphasis added); *see Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 526; 697 NW2d 895 (2005) (relying on *Black's Law Dictionary* to discern plain meaning). As this Court held in *TOMAC I*, Tribe-State compacts are true "contracts," not mere gifts or gratuitous transfers, *contra Tiger Stadium Fan Club Inc v Governor*, 217 Mich App 439; 553 NW2d 7 (1996).

> (C) From and after the effective date of the Compact . . . , the Tribe will make semi-annual payments to the State as follows:
>
> (i) Payment to the Michigan Strategic Fund, or its successor as determined by State law, in an amount equal to eight percent (8%) of the net win at the casino derived from all Class III electronic games of chance, as those games are defined in this Compact.

(Compact § 17, App 21a (emphasis added).)

The parties could not have used clearer language in stating their intent that the revenue sharing payments be made "to the State." (This is unsurprising, given that the compacts are contracts between the individual Tribes "and the State of Michigan," not the MSF. Compact at 1, App 5a.) The payments are thus State funds, and they are subject to the Appropriations Clause. MCL 18.1441(1) ("receipts of state government from whatever source derived shall be deposited pursuant to directives issued by the state treasurer and credited to the proper fund") (emphasis added); Const 1963, art 9, § 17 ("No money shall be paid out of the state treasury except in pursuance of appropriations made by law."). And because the payment provisions lack a supporting legislative appropriation, they are invalid.

The exact same result is reached by examining the payment stream. As an initial matter, the Tribe "shall make payments to the State." (Compact § 17(B), App. 21a.) Rather than sending the payments to the Treasury, however, the State directs the Tribe to pay the monies to the MSF, instead. (Compact § 17(C), App. 21a.) This is an "act by which the legislative department of government designates a particular fund [the revenue sharing payments] . . . to be applied to some general object of governmental expenditure, or to some individual purchase or expense [the MSF]." *Black's Law Dictionary* 102 (8th ed 2004) (defining a public law "appropriation"). Simply to describe the payment stream is to define an appropriation.

Critically, adoption of the State's interpretation would have the unintended effect of permitting a mere plurality of legislators to divert payments from the Treasury in any contract, thus circumventing MCL 18.1441(1) and Article 9, Section 17 of Michigan's 1963 Constitution. And since the Legislature can choose to approve any State contract by mere resolution, *TOMAC I*, 471 Mich at 327; 685 NW2d 221 ("Our Constitution does not prohibit the Legislature from approving contracts . . . by concurrent resolution."), millions of dollars in payments to the State under any kind of agreement could quite easily be redirected to the plurality's pet agency or another location within or without the government. The State's and Interveners' argument is akin to an employee who claims he did not embezzle because he did not take money "out of" his employer's cash register, but merely placed a customer payment directly in his pocket.[2]

The Interveners' citation to this Court's decisions in *In re Advisory Opinion on Constitutionality of Act No 346 of Public Acts of 1966*, 380 Mich 554; 158 NW2d 416 (1968), and *WA Foote Memorial Hospital Inc v Kelley*, 390 Mich 192, 213; 211 NW2d 649 (1973), (Interveners Appellees Br at 31-32), demonstrates just how far the Interveners must reach to give their appropriations argument any credibility at all. The cases are completely inapposite. As the Interveners acknowledge, both cases involved public acts. (*Id.*) Neither involved the Legislature's attempt to divert "payments to the State" to a separate public corporation by resolution.[3]

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[2] As all parties (including then-Governor Engler and the MSF) and the Court of Appeals acknowledged in *Tiger Stadium* when considering this Constitutional question, it is "of no consequence that the [revenue sharing] funds were never placed in the state treasury or that they were remitted directly to a public corporation. The location of the funds is irrelevant . . . ." 217 Mich App at 447-448; 553 NW2d 7. The question is whether the monies involved—no matter where they wind up—are State funds. If the answer is "yes," then any destination other than the State Treasury requires a legislative appropriation.

[3] The unconstitutionality of the revenue sharing payments in the original compacts extends to the Governor's Amendment. The Amendment is the subject of Supreme Court Nos. 129822 and 129818, and TOMAC fully addresses the Amendment's validity in its separate briefing under

In sum, the question is not whether "the MSF is statutorily authorized to receive the tribal payments." (State Appellees Br at vi, 13-15; Interveners Appellees Br at 35.) Rather, the question is whether the revenue sharing payments belong "to the State," such that they must be appropriated by law before being diverted to the MSF. The compacts' plain language unambiguously states that the payments are made "to the State," and the lack of an accompanying legislative appropriation renders the payment provision invalid.

II. THE COMPACTS' REVENUE SHARING PAYMENT PROVISION IS EXPRESSLY NON-SEVERABLE.

In an effort to save the compacts from the Section 17 revenue sharing payment provision's constitutional infirmity, the State and Interveners argue that the compacts' severability clause "expresses no intent one way or the other on the severability of the provisions contained in Sections 17 and 18." (State Appellees Br at 16; Intervening Defendants Appellees Br at 42.) This argument cannot be reconciled with the clause's plain language, which states:

> In the event that any section or provision of the Compact . . . is held invalid by any court of competent jurisdiction, it is the intent of the parties that the remaining sections or provisions . . . shall continue in full force and effect. This severability provision does not apply to Sections 17 and 18 of this Compact.

(Compact § 12(E), App 18a (emphasis added).)

The State and Interveners insist the emphasized sentence does not affirmatively say that Sections 17 and 18 are not severable, but rather directs a court to determine whether any invalidated portion of Section 17 or 18 is so "essential" to the agreement that the invalidity should result in the compacts' failure as a whole. (State Appellees Br at 16-18; Interveners Appellees Br at 42-44.) But this construction would make the sentence utterly superfluous. Courts are always obligated to perform an "essential to the agreement" analysis, even in a

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those case numbers. Interveners mistakenly assert that TOMAC has conceded the Amendment's validity by not briefing it in this proceeding. (Interveners Appellees Br at 28 n 15.)

contract that contains a severability clause. *See, e.g., R T Eckles v Sharman*, 548 F2d 905, 909 (CA 10, 1977) ("a severability clause is but an aid to construction, and will not justify a court in declaring a clause as divisible when, considering an entire contract, it obviously is not.") (quotation omitted); *Budge v Post*, 544 F Supp 370, 382 (ND Tex, 1982) ("A severability clause does not automatically create a severable or divisible contract; the contractual provisions themselves, as well as the underlying circumstances and intent of the parties, must nonetheless be examined. This is true even where the clause clearly and unambiguously specifies its application.") (citation omitted). The interpretation the State and Interveners advance would render the emphasized sentence a nullity, which is impermissible. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003) ("courts must also give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory"). The only other interpretation is to read the emphasized sentence as requiring the invalidity of the compacts in the event any portion of Section 17 or 18 is held invalid, as is the case here.

The State and Interveners are also wrong when they assert that "the MSF as recipient is not central to the parties' core [compact] agreement." (State Appellees Br at 17; Interveners Appellees Br at 43-44.) The *Tiger Stadium* plaintiffs challenged similar payment provisions in the 1993 State-Tribe compacts, seeking to invalidate payments to the MSF and redirect those payments to the State Treasury for proper appropriation. 217 Mich App at 445; 553 NW2d 7. Then-Governor Engler fought in the trial court and Michigan Court of Appeals to vindicate MSF as the ultimate recipient of the payment stream, demonstrating his belief that the MSF as recipient was an essential compact principle.

Finally, the State argues it is appropriate to ignore the non-severability clause, because this Court can direct revenue sharing payments to the State as MSF's "successor as

determined by state law." (State Appellees Br at 17, quoting Compact, § 17(C)(i), App 21a.) But the MSF continues to operate as an entity separate from the State. (Interveners Appellees Br at 32.) And until the MSF ceases operations, it has no "successor." *Black's Law Dictionary* 1431 (8th ed 2004) (a "successor" is one "that succeeds or follows; one who takes the place that another has left, and sustains the like part or character") (emphasis added). The revenue sharing payment provision's invalidity requires that the compacts be invalidated in their entirety.

III. PLAINTIFFS HAVE STANDING.

None of the parties or *amici* in this litigation challenged TOMAC's standing in the trial court (Trial Ct Op at 13, TOMAC App 43a), and the State does not challenge it now. Despite this, two of the Intervening Appellees now contend that TOMAC lacks standing to challenge the constitutionality of the gambling compacts.[4] This argument is meritless. As the federal courts have already held in related cases, TOMAC has standing because no Michigan citizens are more directly affected by the proposed casino than TOMAC's members, who live and work in the shadow of a proposed casino. Applying similar reasoning, this Court should reject the Interveners' arguments, as the State and all other parties have done.[5]

Interveners maintain that TOMAC's injuries are no different than those of the public at large. (Interveners Appellees Br at 17-18.) However, unlike other members of the population, TOMAC's members live across the street from a proposed casino complex. They are

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[4] Contrary to Interveners' assertion (Interveners Appellees Br at 15 n 7), TOMAC is again a Michigan corporation in good standing. (TOMAC Supp App 11b-12b.) Having cured its corporate status, its rights are the same as though a dissolution "had not taken place." MCL 450.2925(2). This Court can take judicial notice of TOMAC's updated registration paperwork, documents publicly available from the State. MRE 201(b), (e).

[5] In *National Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 629; 684 NW2d 800 (2004), this Court held that nonprofit organizations like TOMAC "have standing to bring suit in the interest of their members where such members would have standing as individual plaintiffs." The three minimum standing elements are: injury in fact, causation, and redressability. *Id.* at 628-629.

the ones who will bear the brunt of the injuries if a casino is allowed to go forward. These types of injuries are more than sufficient to demonstrate injury in fact for standing. *See TOMAC v Norton*, 193 F Supp 2d 182, 187-188 & n 1 (DDC, 2002) (finding it axiomatic that TOMAC's members have standing since they "are immediately adjacent to a specific development that will significantly and permanently alter the physical environment of their neighborhood"), *aff'd, TOMAC v Norton*, 433 F3d 852, 860; 369 US App DC 85 (2006) ("There is no serious question about TOMAC's standing . . . .").

Interveners complain about the lack of affidavits or testimony in this case to support TOMAC's injuries. (Interveners Appellees Br at 19.) But this criticism is misplaced, because none of the parties challenged TOMAC's standing below. Had they done so, TOMAC would have offered declarations in support of its members' injuries, as it has in other cases. (*See* Decls of Marie Cochran, Sherri Waddle, Linda Lowe, and Jennifer Cochran, TOMAC Supp App 1b-10b (discussed in *TOMAC v Norton*, 193 F Supp 2d at 187-191 ("Several TOMAC members who live within a few blocks of the casino site assert interests in viewing local wildlife, walking in their neighborhood, and enjoying their own properties that are at risk of injury from a 24-hour-a-day casino attracting 4.5 million customers per year.").) This Court can take judicial notice of the declarations' submission in other cases, MRE 201(b), (e)), and TOMAC will introduce similar declarations now if this Court desires it.

Interveners argue that TOMAC lacks standing because it does not allege the illegal expenditure of State funds will result in increased taxation to its members. (Interveners Appellees Br at 18-19.) But TOMAC's injuries come from living next door and down the street from a proposed casino, with all its environmental and economic impacts, making "taxpayer standing" cases inapposite. TOMAC's members have individualized injuries that are distinct from those of citizens at large, though TOMAC itself also has standing under MCL 600.2041(3).

TOMAC's injuries are also "fairly traceable" to the gambling compacts it challenges. *See Cleveland Cliffs*, 471 Mich at 629; 684 NW2d 800. Courts hold that injurious action is fairly traceable if it "authorize[s] the conduct or establishe[s] its legality." *Animal Legal Def Fund, Inc v Glickman*, 332 US App DC 104; 154 F3d 426, 441 (1998). In this case, TOMAC's members face injury from the construction and operation of the Class III casinos the challenged compacts authorize. TOMAC's interest is the same now as it was in *TOMAC I*—to invalidate the compact that authorizes operation of a neighboring casino. A causal connection is therefore clearly established. *TOMAC*, 193 F Supp 2d at 188 (finding causation where the challenged action, taking land in trust for the Band, was "a necessary prerequisite" to operating the casino).

Finally, a favorable decision by this Court will redress TOMAC's injuries. *Cleveland Cliffs*, 471 Mich at 629; 684 NW2d 800. This requirement is satisfied where a favorable ruling would undo the challenged action or put a stop to the plaintiff's injuries. *Edmonds Inst v Babbitt*, 42 F Supp 2d 1, 12-13 (DDC, 1999). Here, a ruling that invalidates the gambling compacts would leave the Pokagon Band without authority to operate a Class III casino. Thus, each of the elements of standing is readily satisfied, as the State has long conceded.[6]

IV. PLAINTIFFS' APPROPRIATIONS ARGUMENT IS NOT BARRED BY *RES JUDICATA*.

Finally, the Intervening Defendants/Appellees frame a *res judicata* argument in a footnote (Intervening Defendants Appellees Br at 12-13 n 6), then rely on the *amici* Tribes to

[6] Interveners also challenge the standing of Laura Baird. (Interveners Appellees Br at 20-24.) But as the Circuit Court properly held, it is unnecessary for the Court to consider Ms. Baird's standing when TOMAC has standing to adjudicate the claims before the Court. (Trial Ct Op, App 43a (citing *House Speaker v Governor*, 443 Mich 560, 573; 506 NW2d 190 (1993).)

make it. (*Amici* Tribes Br at 24-25.[7]) But the *res judicata* doctrine "operates merely to preclude similar claims raised in a *subsequent* lawsuit." *Vandenberg v Vandenberg*, 253 Mich App 658, 663; 660 NW2d 341 (2002) (citation omitted).[8] And "*res judicata* does not bar litigation where a subsequent change in the law alters the legal principles on which the subsequent case is to be resolved." *Baraga County v State Tax Comm'n*, 243 Mich App 452, 457; 622 NW2d 109 (2000) (citation omitted); *Socialist Workers Party v Secretary of State*, 412 Mich 571, 586-587; 317 NW2d 1 (1982); 1 Restatement Judgments, 2d, § 26 cmt e, p 239.

Here, the governing legal principles have changed. Until this Court's holding in *TOMAC I*, the law of the State was the Court of Appeals decision in *Tiger Stadium*, which held that a Tribe's revenue sharing payments to the MSF were not subject to appropriation because "the state did not concede or give away anything" in exchange. 217 Mich App at 449; 553 NW2d 7. (Although the Court of Appeals suggested in passing that a compact is a contract in *TOMAC v State*, 254 Mich App 23, 31; 657 NW2d 503 (2003), it ultimately relied on IGRA and federal preemption, not contract law, in upholding the compacts, *id.* at 46; 657 NW2d 503.) State law is now governed by this Court's holding that State-Tribe casino compacts are "valid contracts," 471 Mich at 312; 684 NW2d 221, meaning such payments are part of a bargained-for

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[7] The State, Interveners, and *amici* Tribes all wrongly assert that the standard of review is abuse of discretion when the Court of Appeals fails to address an issue properly presented below. But this Court will vacate and remand without an abuse of discretion review those Court of Appeals decisions that fail to address central issues. *See, e.g., Soupal v Shady View, Inc*, 469 Mich 458; 672 NW2d 171 (2003); *Hawkeye-Security Ins Co v Hurley*, 437 Mich 1007; 469 NW2d 434 (1991); *People v Johnson*, 431 Mich 683; 431 NW2d 825 (1988); *Great Lakes Steel Div of Nat'l Steel Corp v Mich Pub Serv Comm'n*, 416 Mich 166, 183-184; 330 NW2d 380 (1982); *accord Bangura v Hansen*, 434 F3d 487, 497 (CA 6, 2006) ("We review all other issues *de novo* because the district court did not reach them.").

[8] The *amici* Tribes cite three cases applying res judicata on remand. All three were decided before *Vandenberg,* the most recent Court of Appeals decision addressing this issue. The *Vandenberg* court clearly held that res judicata does not apply to remands. 253 Mich App at 663; 660 NW2d 341. The only case the *amici* Tribes cite that was decided after *Vandenberg* is an unpublished decision that held res judicata inapplicable. *Neal v Dep't of Corr*, Nos 253543 and 256506, 2005 Mich App LEXIS 342 (Mich, Feb 10, 2005) (see attached).

exchange. Because a change in law must always be applied to the case that resulted in the change, *Hicks v Agney*, 413 Mich 556, 558-559; 321 NW2d 383 (1982), it was appropriate for TOMAC to request that all of *TOMAC I*'s implications be applied on remand.[9]

CONCLUSION

The compacts' plain language makes clear that the Tribes' revenue sharing payments are made "to the State," making those moneys State funds subject to appropriation. Because the compacts lack a supporting legislative appropriation and specify that the invalid payment provision is non-severable, the compacts should be invalidated in their entirety, allowing the Legislature to craft new and proper compacts that will ensure Michigan's citizens experience not only the burdens, but the promised benefits of Tribal casino expansion.

Ultimately, the merits position adopted by the State and Interveners raises an even larger issue, not only for casino gambling, but for the control of state revenues generally. If moneys paid to the State can be diverted to any location within or without the government based solely on a legislative plurality's approval of a contract, the Appropriations Clause will be written out of existence. This Court should reject that position and invalidate the compacts.

Dated: July 19, 2006

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[9] For the exact same reason, the appropriations argument is not barred because it surfaced for the first time following *TOMAC I*. (*Amici* Tribes Br at 23.) In any event, "a new theory pertaining only to questions of law on undisputed facts may be raised for the first time on appeal," Markman, Civil Appeals, § 9:144, pp 9-29, particularly where a constitutional error is outcome determinative. *See, e.g., People v Catey*, 135 Mich App 714, 722; 356 NW2d 241 (1984).